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## Chin Well Fasteners Co Sdn Bhd v Sampath Kumar Vellingiri & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P–02–511 OF 2003
MOKHTAR SIDIN, MOHD GHAZALI JJCA AND AUGUSTINE PAUL FCJ
30 SEPTEMBER 2005

B

*Contract — Construction of terms of contract — Employment — Purpose contract was intended to be use — Whether plaintiffs can claim benefits contained in contract of employment even though they did not sign it — Whether defendant bound by it*

C

*Labour Law — Employment — Contract of employment — Mandatory requirements imposed by Indian government — Whether can be varied*

An agreement was entered into between Malaysia and India for the latter to supply
D expert and manual workers to work in Malaysia. In order to protect its citizens and to ensure that they obtain fair and reasonable wages and treatment, the Indian Government had imposed certain mandatory requirements which a prospective foreign employer must meet before the Indian Government would release its citizens for such employment. The prospective employer would have to submit: (a) a demand
E letter for recruitment of workers from India; (b) a contract of employment; (c) a power of attorney; (d) an affidavit from the employer. It was the finding of the learned trial judge that the plaintiffs were entitled to the benefits contained in the contract of employment. However, the contract of employment though signed by the defendant was not signed by the plaintiffs nor did they know of its existence until the dispute between the parties arose, while the defendant had, being not fully aware of
F its contents, considered it to be a mere formality to obtain the release of the plaintiffs. Accordingly, learned counsel for the defendant contended that they were not bound by it. The critical issue for determination was therefore the legal effect of the contract of employment in such circumstances. The High Court gave judgment for the plaintiffs. This appeal was by the defendant.

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**Held**, dismissing the appeal:

(1) Clause 20(b) of the contract of employment stipulated that the employer will not enter into any other agreement with the employee unless it is approved. Obviously, the approval must be that of the Indian authorities and not the
H employee. It was therefore manifestly patent that the dominant force in the contract of employment was the relevant Indian authority and not the employee. It was based on its terms that the plaintiffs were allowed to leave India. The defendant had used it for the purpose it was intended. The defendant must therefore be considered to have agreed to the terms. The fact
I that the defendant's representative did not appreciate its contents when he signed it did not affect its validity (see para 26).

(2) As the defendant had agreed to its terms and had benefited from it by its use to obtain the release of the plaintiffs, the defendant was bound by it even though it was not signed by the plaintiffs. It must also be observed that the

obligation to ensure that the contract of employment was executed by the plaintiffs was that of the defendant. It was through their willful conduct that it was not signed by the plaintiffs (see paras 26 and 28).

**[Bahasa Malaysia summary**

Satu perjanjian dimasuki antara Malaysia dan India di mana India akan membekalkan pekerja-pekerja mahir dan juga buruh ke Malaysia. Untuk memastikan bahawa rakyatnya dilindungi dan dibayar gaji dan layanan yang berpatutan dan munasabah, Kerajaan India telah mengenakan syarat-syarat mandatori yang tertentu yang perlu dipenuhi oleh bakal majikan asing sebelum Kerajaan India melepaskan warganya untuk bekerja di sini. Bakal majikan dikehendaki menyerahkan: (a) surat tuntutan untuk merekrut pekerja-pekerja dari India; (b) perjanjian pekerjaan; (c) surat kuasa wakil; (d) afidavit daripada majikan. Ia merupakan pendapat hakim perbicaraan yang bijaksana bahawa plaintif-plaintif adalah berhak kepada manfaat-manfaat yang terkandung di dalam perjanjian pekerjaan akan tetapi, perjanjian pekerjaan, walaupun ditandatangani oleh defendan, tidak ditandatangani oleh plaintif-plaintif dan mereka juga tidak tahu akan kewujudan perjanjian tersebut sehingga pertikaian di antara pihak-pihak timbul, dan sementara defendan, walaupun tidak mengetahui sepenuhnya terma-terma perjanjian tersebut, telah menganggap ia sebagai cuma satu formaliti sahaja untuk memperolehi perlepasan plaintif-plaintif. Dengan itu, peguamcara defendan telah menegaskan mereka tidak terikat dengannya. Isu yang kritikal untuk diputuskan ialah efek undang-undang terhadap perjanjian pekerjaan dalam keadaan ini. Mahkamah Tinggi telah memberi penghakiman kepada plaintif-plaintif. Rayuan ini adalah oleh defendan.

**Diputuskan**, menolak rayuan:

(1) Klausa 20(b) perjanjian perkerjaan mensyaratkan bahawa majikan tidak akan memasuki sebarang perjanjian dengan pekerjanya kecuali diluluskan. Adalah nyata bahawa kelulusan ini adalah dari pihak berkuasa India dan bukannya dari pekerja. Dengan ini, ia adalah cukup ketara bahawa kuasa yang berpengaruh di dalam perjanjian pekerjaan ini ialah pihak berkuasa India dan bukannya pekerja. Berdasarkan terma-terma perjanjian itu, plaintif-plaintif dibenarkan keluar dari India. Defendan telah menggunakan perjanjian tersebut untuk tujuan yang diinginkannya. Dengan itu, defendan dianggap bersetuju dengan terma-termanya. Walaupun pihak defendan yang menandatangani perjanjian tersebut tidak menyedari isi kandungan perjanjian tersebut, namun ia tidak menjejaskan kesahan Perjanjian tersebut (lihat perenggan 26).

(2) Oleh kerana defendan bersetuju dengan terma-terma dan telah mendapatkan manfaat daripadanya untuk memperolehi pelepasan plaintif-plaintif, defendan adalah terikat dengannya walaupun perjanjian tersebut tidak ditandatangani oleh plaintif-plaintif. Ia juga perlu diperhatikan bahawa obligasi untuk memastikan perjanjian pekerjaan ditandatangani oleh plaintif-plaintif adalah

atas defendan. Ia adalah kelakuan defendan yang disengajakan yang mengakibatkan perjanjian tersebut tidak ditandatangani oleh plaintif-plaintif (lihat perenggan 26 dan 28).]

**Notes**

For cases on construction of terms of employment contract, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2753–2755.

For cases on contract of employment, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 796–817.

**Cases referred to**

*Alghussein Establishment v Eton College* [1991] 1 All ER 267 (refd)
*Foley v Classique Coaches Ltd* [1934] 2 KB 1 (refd)
*Heller Factoring Sdn Bhd v Metalco Industries* [1995] 2 MLJ 153 (refd)
*L'Estrange v Graucob* [1934] 2 KB 394 (refd)
*Majumder v AG of Sarawak* [1966] 1 MLJ 41 (refd)
*New Zealand Shipping Co v Societe des Ateliers Chantiers de France* [1917] 2 KB 717 (refd)
*Serangoon Garden Estate Ltd v Marion Chye* [1959] MLJ 113 (refd)
*Sudbrook Trading Ltd v Eggleton* [1983] 1 AC 444 (refd)

**Appeal from**: Civil Suit No 22–593 of 2002 (MT4) (High Court, Pulau Pinang)

*Dato' Ghazi bin Ishak (Ong Kheng Leong with him) (Ghazi & Lim) for the appellant.*
*Raja Aziz Addruse '(M Thayalan and Jessica Ram Binwani with him) (Meena Raman & Partners) for the respondents.*

**Augustine Paul FCJ (delivering judgment of the court):**

**[1]** The claim in this appeal arose from the recruitment of the plaintiffs (the respondents before us), foreign workers from India, by the defendant (the appellant before us). The High Court gave judgment for the plaintiffs. This appeal is by the defendant.

**[2]** The facts of the case as found by the learned trial judge are as follows. An agreement was entered into between Malaysia and India for the latter to supply expert and manual workers to work in Malaysia. In order to protect its citizens and to ensure that they obtain fair and reasonable wages and treatment, the Indian Government had imposed certain mandatory requirements which a prospective foreign employer must meet before the Indian Government would release its citizens for such employment. The prospective employer would have to submit the following documents:

(a) a demand letter for recruitment of workers from India;

(b) a contract of employment;

(c) a power of attorney;

(d) an affidavit from the employer.

**[3]** The learned trial judge dealt with the requirements of these documents based on the evidence adduced.

*(a) The Demand Letter*

**[4]** The letter was in the defendant's letter head and addressed to their agent Mithun Travels Pte Ltd ('Mithun') in India. This letter dated 11 July 2002 requested for 100 general workers between the ages of 21 and 35 years. It also stated that their monthly basic salary would be RM600 with overtime provided. It stipulated that the workers would work six days a week for eight hours a day. Accommodation and transport would be provided free. The letter also stipulated that the employer would be responsible for all government levy and other immigration charges and that the employer would provide the employees with free return air-tickets from India to Malaysia.

*(b) The Contract of Employment*

**[5]** The contract of employment ('the contract of employment') was also on the defendant's letter head. It defined the defendant as the employer and the worker as employee. It contained 22 clauses almost identical in terms to those contained in the demand letter. It was signed by the employer's representative one Tsai Yang Chuan who was the defendant's first witness in these proceedings and who described himself as the managing director of the defendant. He signed it in the High Commission of India in Kuala Lumpur before a local Notary Public, Mr Inderjit Singh. Besides his signature, he also declared that he had gone through the contents of the contract of employment and understood it completely. He undertook not to violate any clause mentioned in the contract of employment and he agreed that he was liable for action in case of any violation. His signature was attested by the Second Secretary to the High Commission of India in Kuala Lumpur. However, the contract of employment was not signed by the employees.

*(c) Power of Attorney*

**[6]** There was a power of attorney given to Mithun by the defendant to enable Mithun to handle all the defendant's affairs associated with the recruitment of workers for employment with the defendant. It was again signed by Tsai Yang Chuan.

*(d) Affidavit*

**[7]** The document entitled as an 'affidavit', stated that the management of the defendant which intended to employ 100 Indian workers as production operators, undertook the responsibility of repatriating any Indian worker as a result of breach of contract by either side, by providing a return air-ticket at the defendant's expense and settling the employees' dues, besides returning the passports to the holders.

**[8]** Upon being satisfied that its citizens have been properly secured of an employment with the required basic salary, the Protector of Emigrants would then issue a clearance for the citizen to leave India and the protector's clearance would be endorsed on the employee's passport, as was done in this case. Sampath Kumar

(PW1) exhibited the relevant page of his passport bearing this clearance which bore the contract number of the contract of employment between the parties.

**[9]** At the trial, it was agreed that the evidence of three of the plaintiffs would be sufficient. The defendant appointed Mithun to recruit the 52 plaintiffs. Mithun advertised in the local newspapers in India for workers needed by the defendant. PW1, whose evidence was almost identical to that of the other two, testified that upon seeing the advertisement in his local newspaper he went to Mithun where he had to pay Rs150 to register his name to attend an interview. He was told that a little education was sufficient for the job but that he had to pay Rs100,000 to secure the job. The said Rs100,000 would include the charges for the medical check-up, visa, immigration, air-ticket and the Malaysian Government's levy for three years. He could not pay the Rs100,000 immediately. Initially he paid Rs2,000 for the medical check-up. After he had passed the medical examination, he paid a further Rs10,000 as advance payment. After obtaining the visa, he paid another Rs8,950 for the air-ticket and Rs640 to the Malaysian High Commission at Madras, being the cost for stamping his visa. Then a day before his departure, he paid Mithun Rs78,410 being the balance. He paid the said sum to one Ranjit, of Mithun. He was told that he would get Rs10,000 per month as basic salary with additional overtime. He was not given any written terms of employment. He then left for Malaysia on 28 August 2002. As he did not have the said sum of Rs100,000, he went with his parents and borrowed the said sum from two persons. He produced as exhibits two promissory notes each for Rs50,000. His father signed as the borrower and his mother signed as the witness.

**[10]** He said that when he entered Malaysia he brought with him USD1,000. This was his money as it was cashed for him from the Rs100,000 he had paid to Mithun in India. Mithun had handed him the USD1,000 and had instructed PW1 as well as all the other workers to hand over the said sum (although some paid only USD950) to their local agent, one Amarjeet Singh who would meet them on arrival. Amarjeet Singh collected the money from all of them before clearing immigration and customs. They were then put in a bus and sent to the defendant's factory in Butterworth. The sum of USD1,000 has been endorsed on PW1's passport. At the factory the workers were met by the defendant's public relations officer, one Miss Teoh, who collected their passports. They commenced work on 2 September 2002. Before this group there was another group that had arrived on 23 August 2002. A third group arrived on 9 September 2002. They received their first pay on 5 October 2002 and in the words of the witness, received two shocks. Firstly, they received a basic salary of RM350 instead of the equivalent of Rs10,000 which was RM750. Secondly, they were told a levy would be deducted from the RM350.00. This was told to them by one Miss Hwa Mei Ling. When they protested she together with one Mr Michael (in charge of production), and Mr Kaw (the production engineer) told them to wait in the canteen to sort out the matter. At about 2.30pm, the three of them arrived with all the supervisors and told them that in so far as the defendant was concerned the salary to be paid was only RM350 per month and they told the workers that they did not know what 'your agent had promised you'. They were then told to go back to the hostel.

**[11]** When they met with other Indian nationals who were working in other companies they were advised to go to the Indian High Commission in Kuala Lumpur

and to obtain a copy of their contract of employment from the High Commission and then to talk to their employer. They selected 10 representatives from amongst them to go to Kuala Lumpur. There they met with the First Secretary to the High Commission and from him they obtained a copy of the contract of employment which was signed by the defendant's managing director. The First Secretary explained the contents of the agreement to them which they had never seen before and which they had not signed. When they returned to work the following day their punch cards were missing. They were told that if they wished to return to work they had to sign another contract with a basic salary of RM350. They refused to sign this and the employer refused to allow them to work. The employer then explained to the workers that what they thought was an agreement which was signed by the defendant's managing director was actually not the agreement but a document which was a mere formality to bring them into Malaysia from India. Mr Michael and Mr Kaw informed them that they would be permitted to resume work only if they signed the fresh agreement.

**[12]** On 16 October 2002 at about 2.30pm, they received a further shock. They were informed by Mr Michael that the defendant had decided to send them all back. They were not given any termination letters but they were told to pack and to be ready for departure to India. There were four of them. They then decided to lodge a police report at the Bukit Mertajam Police Station since their complaint to the Labour Department was not acted upon. At about 4.00pm on that day, the four of them were given back their passports so that they could be sent back. They then retained solicitors. Since they refused to leave the hostel, the defendant cut the water and electricity supplies to the hostel until the High Court granted an injunction to restrain the defendant from doing so. About six workers, whose commitment would not permit them to remain unemployed, signed two documents. They are:

(a) a fresh contract with a basic salary of RM350;

(b) a voluntary declaration that they withdraw from this case.

**[13]** These documents were exhibited in the agreed bundle of documents. Under cross-examination, PW1 agreed that his claim was based on the contract of employment signed by the managing director where his basic wage was stated as RM600.

**[14]** The evidence of Periyathambi Gunasekaran (PW2) was almost similar to that of PW1. He reiterated that he was told by Mithun that he would be paid Rs10,000 per month with overtime payment. He was from the third batch having left India on 9 September 2002. He too gave Amarjeet Singh the USD1,000 being the levy. This witness testified that the levy asked for, when he received his first pay, was RM120 which was to be deducted from the RM350. He was one of those who had signed the fresh agreement and the withdrawal letter and had gone back to work. He was compelled to sign the said document because he was eating only one meal for 10 days and he could not stand the hunger. Under cross-examination, the defence put to the witness that Mithun had told the workers that they would be paid a total of RM710 inclusive of overtime and that they had to work 12 hours a day and not eight hours. These suggestions were denied by the witness. He also denied a suggestion that Mithun had represented to him that the levy would be deducted monthly from their salary. When questioned about Amarjeet Singh, the witness testified that Amarjeet

Singh himself had informed them that he was the agent of the defendant when he met them at the airport. Amarjeet Singh had informed them that the USD1,000 was for the three-year Government levy. He denied a suggestion that they were paid a daily food allowance of RM1.50, and that there was a food subsidy added to the pay. Even during overtime working hours, they were not given any food allowance. However, he agreed that if they worked the full 25 days they would be given an incentive allowance of RM60, and RM30 if they worked for half the month.

**[15]** Abdul Mohamed Noor Mohamed's (PW3) evidence was similar to that of the other two witnesses. He said that he arrived in Malaysia on 23 August 2002. He too paid USD950 as levy to Amarjeet Singh. He testified that he had no savings and had to sell his wife's jewelleries to raise the Rs100,000. With these witnesses the plaintiffs closed their case on the issue of liability.

**[16]** The defendant's managing director, Mr Tsai Yang Chuan (DW1) testified as the first defence witness. Since the company had decided to employ workers from India, he left it to one Richard Yap to do the recruitment. He personally was not aware of the procedures involved in recruiting foreign workers. With regard to the contract of employment that he had signed, he testified that although his signature appeared on it, someone had prepared the documents and he was requested by him to sign them. He was shown all the four documents referred to earlier bearing his signature and he said that he signed them because Richard Yap had informed him that all these documents were necessary only for the purpose of obtaining the visa. Under cross-examination, he said that whilst the official had explained to him the terms, it was made known to him that the workers' salary was RM350 per month. He was told that the RM600.00 stated in the demand letter and in the contract of employment was only for the purpose of applying for the workers' visa but that the actual salary was only RM350. He was also not explained that he had to pay the air passage of the workers. He was also told that the levy was to be paid by the worker. He admitted that he studied English although his evidence was in Mandarin.

**[17]** The second witness for the defence was Richard Yap (DW2), the senior administration manager of the defendant. Under cross-examination, he said that a statement of the terms of employment was given to their consultant, Amarjeet Singh in May 2002 for him to pass on to their agent in India to recruit workers based on those terms and conditions. There was also a demand letter but it contained terms totally different from those contained in the demand letter earlier referred to as being one of the four documents necessary to be submitted by the prospective employer to the Indian Government before the Protector of Emigrants could grant his approval for the worker to leave India. This demand letter was given to Amarjeet Singh. It stated that the salary was to be RM350 per month with a food subsidy of RM1.50 per day and a night shift allowance of RM4.50 per shift worked, and that if there was overtime of more than three hours, free food would be served. The employer would provide for the worker's passage out of India but the worker would have to pay for his return ticket. DW2 told the court that he found out from Amarjeet Singh that the latter had indeed sent the letter of demand dated 30 May 2002 to Mithun. When the workers refused to sign the new agreement he informed them that the agreement was that they would be paid a nett sum of RM710 per month including overtime. He also testified that the document his managing director signed was only for attestation purposes and not to be used as the basis of a contract.

**[18]** The last witness for the defence was Amarjeet Singh (DW3). He said that he is a Foreign Workers Recruitment Consultant. However, under cross-examination, it was revealed that he had no consultancy firm and has not even registered such a business. He did not receive any payment from the defendant for his services, but he collected his commission from Mithun. He brazenly admitted that he collected USD950 per person as his commission. He also sent the demand letter dated 30 May 2002 to Mithun but he has no record to show that he had sent it. He testified that Mithun was to explain to the workers that they were to be paid RM350 per month. This, he said, was the first time that he had recruited workers from India. However, when it was pointed out to him that in his witness statement, which he had affirmed as containing the truth, he had said that he had recruited workers from India since 1995, he said that what was stated in his witness statement was not true. When shown the demand letter which stated the basic salary as RM600, he admitted he had also sent this document to Mithun. He also confirmed that the levy was to be paid by the employer together with the air fares to and fro. When asked to explain why he had sent two demand letters, one stating a salary of RM350 and the other RM600, he testified that the first was the actual salary whereas the second was a mere formality so as to get their clearance. He agreed that Mithun would not be able to get the clearance if only the first letter had been shown to the Government of India, as the basic wage the Government demanded for its citizens was RM600. Regarding the USD950, he said it was for him and was not for payment of the levy. To a question by the court as to whether he had issued a receipt to Mithun for the money he had collected from the 52 workers he said he had not.

**[19]** The claim of the plaintiffs is based on a breach of the contract of employment by the defendant. The relevant parts of the statement of claim of the plaintiffs on the damages claimed by them read as follows:

> 9. Defenden telah memungkiri terma-terma perjanjian pertama tersebut atau secara alternatifnya perjanjian kedua tersebut seperti berikut:
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> BUTIR-BUTIR KEMUNGKIRAN
>
> (a) Defendan telah gagal membayar gaji pokok minima sebanyak RM750 seperti yang dinyatakan di perenggan 4 di atas, atau secara alternatifnya defendan gagal membayar gaji pokok sebanyak RM600 sebulan di perenggan 3 di atas.
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> (b) Defendan telah memaksa dan mewajibkan plaintif-plantif untuk membuat kerja-kerja lebih masa sebanyak 5 hingga 7 jam tiap-tiap hari.
>
> (c) Defendan telah memaksa sesetengah daripada plaintif-plaintif untuk bekerja pada hari rehat mereka dan defendan tidak membayar 2 kali ganda gaji seperti tertera di dalam perjanjian pertama tersebut atau secara alternatifnya perjanjian kedua tersebut.
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> (d) Defendan telah merampas paspot- paspot untuk plaintif-plaintif ke-5 hingga ke- 79 tanpa kebenaran mereka.
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> (e) Defendan secara 'unilateral' telah cuba meminda perjanjian pertama tersebut dan secara alternatifnya perjanjian kedua tersebut dengan mengemukakan perjanjian yang dipinda tersebut.
>
> (f) Defendan telah cuba memaksa plaintif-plaintif ke-5 hingga ke-79 menandatangani perjanjian yang dipinda tersebut yang mana terma-termanya telah dipinda oleh defendan sendiri secara 'unilateral'.

(g) Defendan tidak menzahirkan (disclose) perjanjian pertama tersebut kepada kesemua plaintif-plaintif dari permulaan pekerjaan sehingga kini.

(h) Defendan telah gagal dalam tugasnya untuk memberitahu plaintif-plaintif mengenai perjanjian pertama tersebut.

(i) Defendan telah mengambil kesempatan kejahilan plaintif-plaintif yang merupakan pekerja-pekerja asing untuk kepentingan diri defendan.

(j) Defendan telah memotong cukai (levy) daripada gaji semua plaintif-pPlaintif walaupun cukai (levy) ini telahpun dibayar terlebih dahulu kepada ajen defendan.

(k) Defendan tidak memberi masa untuk bersembahyang kepada plaintif-plaintif yang beragama Islam.

10. Oleh kerana kemungkiran-kemungkiran defendan atas perjanjian pertama tersebut atau secara alternatifnya perjanjian kedua tersebut, plaintif-plaintif telah mengalami kerugian dan masih mengalami kerugian dan kehilangan.

BUTIR-BUTIR KERUGIAN PLAINTIF-PLAINTIF

(a) Bayaran yang dibuat oleh setiap plaintif bagi:

(i) tiket penerbangan satu perjalanan dari Chennai, India ke Malaysia RM1,078.31 (Rs8,950)

(ii) bayaran pemprosesan visa RM77.10 (Rs640)

(iii) perbelanjaan sehingga kini untuk makanan, pembelian barang-barang keperluan, ulang-alik ke Pesuruhjaya Tinggi India di Kuala Lumpur dan Persatuan Pengguna Pulau Pinang dan sebagainya. RM800

Jumlah bagi setiap plaintif RM1,955.41

(b) Bayaran yang dibuat oleh plaintif pertama, Ke-18, Ke-21, Ke-22, Ke-24, Ke-26, Ke-28, Ke-32, Ke-34, Ke-42, Ke-49, Ke-53, Ke-57, Ke-60, Ke-69 dan Ke-71 setiap satu kepada ajen defendan bagi tujuan bayaran levi kepada Kerajaan Malaysia

RM3,800 (USD1,000)

(c) Bayaran yang dibuat oleh plaintif Ke-3, Ke-5, Ke-8, Ke-12, Ke-13, Ke-14, Ke-15, Ke- 17, Ke-19, Ke-20, Ke-29, Ke-31, Ke-33, Ke- 38, Ke-40, Ke-43, Ke-44, Ke-45, Ke-46, Ke- 50, Ke-51, Ke-54, Ke-55, Ke-56, Ke-58, Ke- 59, Ke-61, Ke-65, Ke-66, Ke-67, Ke-70, Ke- 73, Ke-74, Ke-75, Ke-78 dan Ke-79 setiap satu kepada ajen defendan bagi tujuan bayaran levi kepada Kerajaan Malaysia

RM3,610 (USD950)

(d) Gaji tunggakan bagi tempoh plaintif-plaintif tidak dibenarkan bekerja di kilang defendan pada kadar RM750 sebulan seperti berikut:

(i) bagi plaintif-plaintif ke-8 dan ke-42 untuk bulan Oktober 2002, November 2002 dan Disember 2002;

(ii) bagi setiap plaintif kecuali plaintif-plaintif Ke-8, Ke-17, Ke-21, Ke-22, Ke-42, Ke-66 dan Ke-75 untuk bulan Oktober 2002, November 2002, Disember 2002 dan Januari 2003;

(iii) bagi plaintif-plaintif Ke-17, Ke-21, Ke-22, Ke-66 dan Ke-75 untuk bulan Oktober 2002.

(e) Perbezaan di antara gaji minima yang dibayar oleh defendan sekarang kepada

plaintif-plaintif mengikut terma-terma di dalam perjanjian yang dipinda tersebut dan gaji minima di bawah perjanjian kedua tersebut iaitu sebanyak RM400 sebulan, seperti berikut:

(i) untuk semua plaintif-plaintif bagi bulan September 2002;

(ii) untuk plaintif-plaintif Ke-17, Ke-21, Ke-22, Ke-66 dan Ke-75, untuk bulan November 2002, Disember 2002 dan Januari 2003;

(iii) untuk semua plaintif-plaintif kecuali plaintif-plaintif ke-8, Ke-29 dan Ke-42 dikira dari bulan Februari 2003 sehingga tarikh kes ini diputuskan oleh mahkamah;

(f) Tikit penerbangan balik dari Pulau Pinang ke India bagi plaintif-plaintif Ke-8, Ke-29 dan Ke-42 untuk jumlah RM880 setiap satu plaintif,

14. Oleh yang demikian, plaintif-plaintif menuntut tehadap defendan seperti berikut:

(a) Gantirugi khas bagi setiap plaintif sebanyak RM1,955.41;

(b) Gantirugi khas bagi plaintif pertama, Ke-18, Ke-21, Ke-22, Ke-24, Ke-26, Ke-28, Ke-32, Ke-34, Ke-42, Ke-49, Ke-53, Ke-57, Ke-60, Ke-69 dan Ke-71 sebanyak RM3,800 bagi setiap plaintif;

(c) Gantirugi khas bagi plaintif Ke-3, Ke-5, Ke-8, Ke-12, Ke-13, Ke-14, Ke-15, Ke-17, Ke- 19, Ke-20, Ke-29, Ke-31, Ke-33, Ke-38, Ke- 40, Ke-43, Ke-44, Ke-45, Ke-46, Ke-50, Ke- 51, Ke-54, Ke-55, Ke-56, Ke-58, Ke-59, Ke- 61, Ke-65, Ke-66, Ke-67, Ke-70, Ke-73, Ke- 74, Ke-75, Ke-78 dan Ke-79 sebanyak RM3,610 setiap plaintif.

(d) Gaji tunggakan bagi tempoh plaintif-plaintif tidak dibenarkan bekerja di kilang defendan pada kadar RM750 sebulan seperti berikut:

(i) bagi plaintif-plaintif Ke-8 dan Ke-42 untuk bulan Oktober 2002, November 2002 dan Disember 2002;

(ii) bagi setiap plaintif kecuali plaintif-plaintif ke-8, Ke-17, Ke-21, Ke-22, Ke-42, Ke-66 dan Ke-75, untuk bulan Oktober 2002, November 2002, Disember 2002 dan Januari 2003;

(iii) bagi plaintif-plaintif Ke-17, Ke-21, Ke-22, Ke-66 dan Ke-75 untuk bulan Oktober 2002.

(e) Perbezaan di antara gaji minima yang dibayar oleh defendan sekarang kepada plaintif-plaintif mengikut terma-terma di dalam perjanjian yang dipinda tersebut dan gaji minima di bawah perjanjian kedua tersebut iaitu sebanyak RM400 sebulan, seperti berikut;

(i) untuk semua plaintif-plaintif bagi bulan September 2002;

(ii) untuk plaintif-plaintif Ke-17, Ke-21, Ke-22, Ke-66 dan Ke-75, untuk bulan November 2002, Disember 2002 dan Januari 2003;

(iii) untuk semua plaintif-plaintif kecuali plaintif-plaintif Ke-8, Ke-29 dan Ke-42 dikira dari bulan Februari 2003 sehingga tarikh kes ini diputuskan oleh mahkamah.

(f) Tiket penerbangan balik dari Pulau Pinang ke India bagi plaintif-plaintif Ke-8, Ke-29 dan Ke-42 untuk jumlah RM880 setiap satu plaintif;

(g) Gantirugi Teladan;

(h) Gantirugi Am;

(i) Faedah 8% dari tarikh pemfailan writ sehingga penyelesaian penuh jumlah ini;

(j) Kos tindakan ini; dan

(k) Lain-lain perintah atau relif yang difikirkan adil dan suaimanfaat oleh mahkamah yang mulia ini.

**[20]** In making his findings on the claim made by the plaintiffs, the learned trial judge said:

> Having considered the entire evidence it is my judgment that notwithstanding the fact that the plaintiffs had not signed the agreement, the very fact that they came on the representation made by the defendant's agent and the fact that the defendant's Managing Director, himself had signed the contract of employment, are sufficient grounds to hold that there indeed was a contract between the plaintiffs and the defendant and that they had been promised a sum of Rs10,000 whose equivalent is RM750 per month with overtime to be calculated. The plaintiffs will also be entitled to all the benefits as stated in the earlier letter of demand and as stated in the contract document signed by the Managing Director. The plaintiffs are also entitled to the levies which they had paid that is either USD1,000 or USD950 as endorsed in their respective passports, since there is no provision in the Employment Act 1957 that enables the defendant to deduct such levies. The plaintiffs will also be entitled to the air fares to and from Malaysia and costs of the suit.
>
> The senior assistant registrar will work out the damages due to each of the plaintiffs.

**[21]** With regard to proof of special damages, the learned trial judge's direction to the parties as contained in p 15 of his grounds of judgment reads as follows:

> Since the parties were not fully prepared to prove their special damages this court informed them on the next hearing date that it would only decide the issue as to whether there was a contract of employment and whether the wages were to be RM350 or RM600 or RM750 per month. The matter would go before the learned senior assistant registrar for assessment of damages.

**[22]** It must therefore be stressed that the judgment of the High Court is based only on the issue of liability. This is made abundantly clear by the order of court that was extracted which showed that the order of the court is only on the issue of liability.

**[23]** It was the finding of the learned trial judge that the plaintiffs are entitled to the benefits contained in the contract of employment. However, the contract of employment though signed by the defendant was not signed by the plaintiffs. The defendant had considered it as a mere formality to obtain the release of the plaintiffs. Accordingly, learned counsel for the defendant contended that they are not bound by it. The critical issue for determination is therefore the legal effect of the contract of employment in such circumstances. It was signed for the defendant by its agent in the High Commission of India in Kuala Lumpur with the following declaration:

> I Tsai Yang Chuan hereby declare that I have gone through the contents of the 'Contract of Employment' and understand it completely. I shall not violate any clause mentioned in the 'Contract of Employment' and I am liable for action in case of any violation of the 'Contract of Employment'.

**[24]** Some of the significant clauses of the contract of employment read as follows:

18. VARIATION

Any variation or addition/deletion to the terms of this contract during its normal duration will be made with the consent of the competent authority in India/the High Commission of India in Kuala Lumpur.

20. SIGNING OF THE CONTRACT

This Contract will be signed in Malaysia by the Employer in Indian High Commission and by the Employee in India before the Protector of Emigrants the competent authority to whom all complaints concerning the execution of this Contract should be made.

The Employer will not enter into any other agreement with the Employee other than approved. Employee will provide copy of collective Trade Agreement with Trade Unions, if any.

(c) The Employer accede to the request of the Mission officials to visit the workplaces and workers hostel with prior information to look into the welfare of the Indian workers.

21. COMPLAINTS

(d) The Employer agree that in the event of failure to comply with the above, the aggrieved worker may seek redress from the relevant authorities in Malaysia.

**[25]** Before embarking upon a consideration of the legal effect of the contract of employment it is perhaps pertinent to bear in mind the sagacious words of Greer LJ in *Foley v Classique Coaches Ltd* [1934] 2 KB 1 at p12:

> It is a common observation that a decision upon the construction of one contract is not an authority upon the construction of another contract in different words and entered into in different circumstances.

**[26]** As stated earlier, the contract of employment was not signed by the plaintiffs nor did they know of its existence till the dispute between the parties arose while the defendant had, being not fully aware of its contents, considered it to be a mere formality. It is common ground that it is a mandatory requirement of the relevant Indian authorities that before Indian nationals are allowed to work in Malaysia a prospective employer would have to execute, inter alia, a document in the form of the contract of employment. It is a significant document. Clause 18 of it provides in clear terms that any variation of it can be done only with the consent of the competent authority in India or the High Commission of India, Kuala Lumpur. Clause 20(b) stipulates that the employer will not enter into any other agreement with the employee unless it is approved. Obviously, the approval must be that of the Indian authorities and not the employee. It is therefore manifestly patent that the dominant force in the contract of employment is the relevant Indian authority and not the employee. It is based on its terms that the plaintiffs were allowed to leave India. The defendant had used it for the purpose it was intended. The defendant must therefore be considered to have agreed to the terms. The fact that the defendant's representative did not appreciate its contents when he signed it does not affect its validity. It has been held that in the absence of fraud or misrepresentation, a person is bound by a writing to which he has put his signature, whether he has read its contents or has chosen to have them unread (see *L'Estrange v Graucob* [1934] 2 KB 394; *Serangoon Garden Estate Ltd v Marion Chye* [1959] MLJ 113; *Majumder v AG of Sarawak* [1966] 1 MLJ 41). The defendant is therefore bound by the contract of employment.

The next issue to be determined is whether the plaintiffs can claim the benefits contained in the contract of employment as they have not signed it. As the defendant had agreed to its terms and had benefited from it by its use to obtain the release of the plaintiffs, the defendant is bound by it even though it is not signed by the plaintiffs. In support of this finding, reference may be made to *Heller Factoring Sdn Bhd v Metalco Industries* [1995] 2 MLJ 153 where Mahadev Shankar JCA said at p 174:

> It was strenuously submitted that because Matang had not dated or signed this document, there could be no concluded contract. We are unable to subscribe to this view. The true position is that where a contract has been signed by one party only, it can be enforced where there is evidence that the other party has elected to be bound by it. (See the cases in 12 English and Empire Digest (Contract) at p 193 para 1166 where *Backhouse v Coossby* (1737) 2 Eq Cas Abr 32; 22 ER 28; and other cases are referred to. Part performance by one party, accepted by the other, is such other evidence.

**[27]** Similarly in *Sudbrook Trading Ltd v Eggleton* [1983] 1 AC 444, Lord Fraser said at p 484:

> Where an agreement which would otherwise be unenforceable for want of certainty or finality in an essential stipulation has been partly performed so that the intervention of the court is necessary in aid of a grant that has already taken effect, the court will strain to the utmost to supply the want of certainty even to the extent of providing a substitute machinery.

**[28]** It must also be observed that the obligation to ensure that the contract of employment is executed by the plaintiffs is that of the defendant. It is through their wilful conduct that it was not signed by the plaintiffs. In *Alghussein Establishment v Eton College* [1991] 1 All ER 267, the House of Lords reviewed a long line of authorities which reiterated the salutary principle that a person cannot take advantage of his own wrong or default. In that case reference was made to *New Zealand Shipping Co v Societe des Ateliers Chantiers de France* [1917] 2 KB 717 where Viscount Reading CJ said at pp 723–724:

> Unless the language of the contract constrains the Court to hold otherwise, the law of England never permits a party to take advantage of his own default or wrong. In *Mating v Freeman* (1838) 4 Bing NC 395 at p 399, 132 ER 839 at p 841 Coltman J said:
>
> > It is so contrary to justice that a party should avoid his own contract by his own wrong, that unless constrained, we should not adopt a construction favourable to such a purpose.
>
> That appears to me to be the true underlying principle of the cases in which the word 'void' has been construed as if it meant voidable. Unless there are clear words to the contrary, a clause making a contract void must be read subject to the condition that the party who is seeking to set up the invalidity is not himself in default.

**[29]** And Scrutton LJ said:

> ... I think that clause 12 and all other clauses are to be read subject to an overriding condition or proviso that the party shall not take advantage of his own wrong, and therefore is estopped from alleging invalidity of which his own breach of contract is the case.

**[30]** The defendant led no evidence to show that it was not in default in ensuring that the contract of employment was executed by the plaintiffs. It follows that the failure by the plaintiffs to sign it is not fatal. The defendant cannot therefore rely on the non-execution of the contract of employment by the plaintiffs to its advantage. In the circumstances, the defendant is bound by its terms. This means that all other terms of employment offered by the defendant to the plaintiffs are invalid due to the operation of cl 18 of the contract of employment.

**[31]** It follows that the plaintiffs are entitled to the benefits contained in the contract of employment. They include:

4. DURATIONS:

   The duration of the Contract will be for a period of three (3) years commencing on the day of arrival of the Employee in Malaysia. This term of service may be determined as extended as hereinafter provided in clause 17 of this Contract.

5. WAGES:

   (a) The Employee will receive a minimum wage/salary of RM600 per month (excluding allowances and overtime). The Employer undertakes to provide the Employee with not less than 6 days' per week (as prescribed by the Ministry of Labour, Malaysia).

   (b) At the request of the Employee, the Employer will advance an amount not exceeding 4 weeks' Wages/Salary prior to embarkation in Malaysia. The advance will be repaid by the Employee in (12 weeks/3 months) installments to be deducted from his/their wages/salaries.

   (c) Wages will be paid by the Employer at the end of the month.

6. HOURS OF WORK:

   Hours of work shall be eight (8) hours from Monday to Saturday.

7. OVERTIME:

   The basic pay per month without OT is RM600. If the Employee works more than eight (8) hours on any working day, he will receive overtime allowance payment at the rate of time and a half of ordinary time. The Employee may only be asked to work overtime with his consent and shall not be permitted to work overtime for more than two hours in any period of twenty-four hours.

10. PASSAGE:

    (a) The employer will provide the Employee with free air passage from India to Malaysia. Likewise the Employee will receive free return air passage on the expiration of the contract. The Employee must be prepared to travel by air as The Employer shall direct.

    (b) Should the Employee be unavoidably delayed in Malaysia after the termination or expiry of the contract will continue to receive his wages pro rate until the day on which he bark for.

    (c) Should the Employee fail to fulfill the expectation of the employer, his salary shall not be reduced or deducted in any way. The Employer will provide the return air ticket for his repatriation after settling the dues, if any.

11. TRAVEL DOCUMENT AND MEDICAL EXAMINATION:

(a) The Employer will undertake to obtain on the Employee's behalf all necessary travel document free of charge to the Employee and will further arrange for the Employee to be examined free of charge by a Registered Medical Practitioner.

(b) The Employer/Company shall undertake to renew the work permit in time.

(c) The Employer will undertake to apply for worker's pass from the Immigration to enable the Employee to travel freely in the vicinity area - place of stay.

(d) In the event of detention of the employee by the Immigration/police for whatsoever reasons, the employer shall arrange release of said employee and continue to employ. In case the employee is unable to be taken back for work, the employer shall arrange repatriation at his own cost.

(e) The Employer will not engage any agent to renew the passport/work permits of the employees. The Employer or and authorized officer of the organization will undertake all the necessary steps for this purpose.

(f) The Employee recruited will be received by the Employer on arrival at the airport.

13. MEDICAL AND ACCOMMODATION (LEVY & WORK PASS):

The employer shall provide to the employee, during the term of service the following:

(a) Free medical attention.

(b) Free accommodation - the accommodation should contain at the minimum, cot with mattress, locker facilities and other basic amenities including convenient and sufficient toilet facilities.

(c) The charges for work pass and levy will be borne fully by the Employer and he will not deduct from the wages/salaries of the employee.

(d) The premium of Bank Guarantee given by the Employer to the Immigration shall not be deducted from the wages/salaries of the employee.

(e) Free transportation from the place of resident to work place and back.

**[32]** The defendant is in clear breach of the contract of employment. The plaintiffs are entitled to the damages claimed. The defence has conceded to the salary of the plaintiffs as being RM750 per month and to the claims enumerated in para 14c, d and e of the statement of claim. The other heads of special damages claimed by the plaintiffs fall within the terms of the contract of employment and for damages following its breach. The plaintiffs are entitled to them. No award under the head of general damages can be made as the plaintiffs had abandoned the claim in the middle of the trial in the High Court.

**[33]** In the upshot, we are of the unanimous view that the appeal should be dismissed with costs.

*Appeal dismissed.*

Reported by Sally Kee